

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CARL W. NANNI, SR. AND JACQUELINE NANNI	:	:DETERMINATION DTA NO. 807071
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1982 through 1984.	:	

Petitioners Carl W. Nanni, Sr. and Jacqueline Nanni, 632 Van Voorhis Avenue, Rochester, New York 14617 filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1982 through 1984.

A hearing was commenced before Marilyn Mann Faulkner, Administrative Law Judge, at the offices of the Division of Tax Appeals, 259 Monroe Avenue, Rochester, New York, on January 7, 1992 at 9:15 A.M., and continued to conclusion on May 1, 1992 at 1:15 P.M. at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, with all briefs to be submitted by August 17, 1992. The parties did not submit briefs. Petitioner Carl W. Nanni, Sr. appeared by Reyes & Regan (Michael J. Regan, Esq., of counsel) at the January 7, 1992 hearing and petitioner Jacqueline Nanni appeared by Harris, Evans, Fox & Chesworth, Esqs. (Louis J. Micca, Esq., of counsel) at the May 1, 1992 hearing.¹ The Division of Taxation appeared by William F. Collins,

Esq. (Michael B. Infantino, Esq., of counsel).

ISSUES

¹Due to clerical error, the Notice of Hearing with respect to the January 7, 1992 hearing was addressed only to Carl W. Nanni, Sr. Therefore, after the January 7 hearing was completed with respect to Carl W. Nanni, a Notice of Hearing was sent to Jacqueline Nanni resulting in the continued hearing on May 1, 1992 with respect to Jacqueline Nanni only.

I. Whether the Division of Taxation proved fraudulent intent by Carl Nanni for the purpose of imposing a fraud penalty pursuant to Tax Law § 685(e)(1).

II. Whether a court's imposition of restitution on Mr. Nanni in a criminal action collaterally estopped the Division of Taxation from imposing a tax deficiency and civil fraud penalty with respect to the same audit period.

III. Whether the Notice of Deficiency was jurisdictionally defective with respect to Mrs. Jacqueline Nanni.

IV. Whether the tax deficiency and fraud penalty should be dismissed against Mrs. Nanni because she did not sign, or authorize Mr. Nanni to file, a New York State joint income tax return for the years in question.

FINDINGS OF FACT

Petitioner Carl W. Nanni, Sr. is a public accountant who was the majority shareholder of three closely-held corporations -- Protection Unlimited, Inc., Lake Avenue Aggregate Properties, Inc., and Computer Accounting Systems, Inc.

By letter dated May 31, 1985, James A. Dobson, a tax auditor with the Division of Taxation ("Division"), informed Carl Nanni that he,

Jacqueline Nanni,² Computer Accounting Systems, Inc. and Protection Unlimited, Inc. had been selected for audit for the taxable years 1982, 1983 and 1984. In that letter, Mr. Dobson stated the following:

"A search of the records of the NYS Department of Taxation and Finance does not disclose NYS corporation returns being filed by either Computer Accounting Systems, Inc., or Protection Unlimited, Inc., for taxable years 1982, 1983, or 1984. Information on the filing status of these corporations for years prior to 1982 is hereby requested from you."

²Jacqueline Nanni is married to Carl Nanni, Sr. Both Jacqueline and Carl Nanni filed joint income tax returns for the years 1982, 1983 and 1984. For the year 1982, Carl Nanni was listed as the proprietor of Computer Accounting Systems, Inc., on Schedule C of the income tax form, whereas on Schedule C of the 1983 and 1984 income tax returns Jacqueline Nanni was listed as the proprietor.

In addition, Mr. Dobson requested the following documents in the May 31 letter:

- "a) Copies of the Federal corporation returns of both corporations for 1982, 1983, and 1984 audit years.
- "b) Copies of your individual Federal Form 1040 for audit years 1982, 1983, and 1984.
- "c) All bank statements and cancelled checks for the period ending 12/31/81 through and including the period 3/31/84 of you and your wife.
- "d) Information on loans, inheritances, gifts, etc. received by you or your wife during the audit years 1982, 1983, and 1984.
- "e) All books and records including, but not limited to journals, ledgers, bank statements, accountant's workpapers for 1982, 1983 and 1984 of:

Carl L. Nanni Accounting
Computer Accounting Systems, Inc.
Protection Unlimited, Inc."

On September 16, 1985, Mr. Dobson held a conference with Carl Nanni the purpose of which was to obtain information with respect to the

business activities of Computer Accounting Systems, Inc. In his summary of the conference, Mr. Dobson noted that he had previously requested from Carl Nanni on September 11, 1985 bank statements and cancelled checks for months in 1983 and 1984, and accountant's workpapers and/or spread summary sheets for the fiscal years ending June 30, 1982, June 30, 1983 and June 30, 1984. Mr. Dobson also noted that Mr. Nanni failed to bring with him to the September 16 conference the spread sheets or any books and records showing a summary of the income and expenses shown on Computer Accounting Systems, Inc.'s Federal tax returns. The excuse offered by Mr. Nanni for this failure was that his office had recently been enlarged and the spread sheets had been misplaced during the process, but that his office staff was attempting to locate the missing items and would forward the documents to Mr. Dobson when found. According to Mr. Dobson's final field audit report dated October 22, 1985, Mr. Nanni did not deliver the requested spread sheets of Computer Accounting Systems, Inc.

According to Mr. Dobson's summary of the September 16 conference, Mr. Nanni indicated that he was retired and was receiving social security payments. The auditor's file

contained a letter dated May 21, 1986, from the Social Security Administration, confirming that Mr. Nanni received social security benefits beginning March 1983.

Based on an audit of the records Mr. Nanni provided and information from third parties, the net profit of Computer Accounting Systems, Inc. was \$17,758.23 for the fiscal year ending June 30, 1984 and \$34,241.42 for the fiscal year ending June 30, 1983. The audit investigation revealed that Mr. Nanni filed Federal corporation tax returns for Computer Accounting Systems, Inc. even though the proper net profit was not reported and that Mr. Nanni did not file New York State corporation tax returns for Computer Accounting Systems, Inc. The auditor concluded that the failure to file New York State corporation tax returns for Computer Accounting Systems, Inc., Lake Avenue Aggregate Properties, Inc. and Protective Unlimited, Inc. was not inadvertent but a willful attempt to defraud the State of New York with respect to taxes legally due.

In his report, the auditor also noted that Mr. Nanni was an accountant with a practice that specialized in various tax laws, both Federal and New York State, and that he represented taxpayers who appeared before the Division. During the audit investigation, it was revealed that Mr. Nanni prepared tax returns for three businesses which underreported the amount of tax due. For example, Mr. Nanni failed to file sales tax returns on behalf of Mr. Donald Gladstone, owner of a service station, despite the fact that there was evidence that Mr. Gladstone paid Mr. Nanni sums of money for the purpose of filing and paying sales and payroll taxes on behalf of Mr. Gladstone. In addition, Mr. Gladstone stated that he did not authorize Mr. Nanni to write \$13,650.00 in checks to Mr. Nanni or to cash, which were endorsed by Mr. Nanni, from Mr. Gladstone's account with Computer Accounting Systems, Inc.

The auditor prepared a Statement of Net Worth Analysis³ for the audit years 1982, 1983 and 1984 with respect to Carl and Jacqueline Nanni which indicated the following understatement of income:

³In this proceeding, petitioners do not challenge the audit method or amount of tax determined by this method.

<u>Year</u>	<u>Reported Income</u>	<u>Taxes Paid</u>	<u>Corrected Income</u>	<u>Corrected Tax</u>
1982	\$16,934.60	\$78.50	\$115,467.72	\$10,733.51
1983	22,628.03	43.80	64,837.21	4,167.66
1984	--	9.02	71,508.66	4,866.98

Based on the information obtained during the course of the audit investigation and the fact that Mr. Nanni was an accountant, the auditor concluded in his final field report, dated October 22, 1985, that the understatement of Mr. Nanni's income during the audit period was not inadvertent but a willful act with the intent to evade personal taxes and defraud the State of taxes legally due. Thereafter, the Division referred the case to the State Attorney General's Office for criminal action.

On April 18, 1986, Mr. Nanni was indicted on four counts of offering a false instrument for filing in the first degree, in violation of section 175.35 of the Penal Law, and for filing sales tax returns on behalf of Lopez Steak House containing false information with the intent to defraud the New York State Department of Taxation. On the same date, he was also indicted on two counts of Grand Larceny in the Second Degree, in violation of section 155.35 of the Penal Law, for collecting sales tax from Lopez Steak House and Donald Gladstone d/b/a Don's Mobil and not remitting the same to the New York State Department of Taxation. On November 17, 1986, Mr. Nanni was found guilty on all six counts.

In March or April of 1986, the State Attorney General also charged Mr. Nanni with committing three counts of violating Tax Law § 1095(a) for failure to pay corporation franchise tax with respect to Computer Accounting Systems, Inc. for the fiscal years ending June 30, 1983, June 30, 1984 and June 30, 1985 with intent to evade the tax imposed, and three counts of violating Tax Law § 695-a for rendering a false or fraudulent personal income tax return for the years ending December 31, 1982, December 31, 1983 and December 31, 1984 with the intent to evade taxes.

On March 20, 1987, the State Attorney General, appearing by Charles D. Steinman (assistant attorney general), Mr. Carl Nanni and his attorney, Mr. George J. Nier, appeared before Rochester City Court with the Honorable John Manning Regan, presiding. At that time,

Mr. Steinman indicated that he would accept from Mr. Nanni a plea of guilty on two counts.

The following discussion took place in court:

Mr. Steinman: ". . . I have offered Mr. Nanni through his attorney, to plead guilty to two counts, one each of each section of the charges against him in full satisfaction of all the charges against him which is listed in the Information, and in full satisfaction of any unfilled charges or potential charges relating to Mr. Barbato. It was also discussed that the Court would sentence Mr. Nanni to a term of Probation at the time of sentence, and that the Court would order a presentence investigation."

* * *

The Court: "We will be discussing sentence at the time we get the presentence investigation returned. Has the department worked out the sentence?"

Mr. Steinman: "No. Not as of yet, but it is the position of the Department of Taxation and Finance that certain amounts due and owing, and Mr. Nanni indicated that those amounts may be subject to some correction, and I have offered Mr. Nanni an opportunity to sit down with the Tax Department to try to resolve the discrepancy."

The Court: "Mr. Nanni, how do you plea to violation of Article 109-5a [sic] of the Tax Law, in that on June 30, 1983, you did violate Article 109-5a [sic] of the Tax Law, failure to file a tax return for a corporation, Computer Systems, guilty or not guilty?"

Mr. Nanni: "Guilty."

The Court: "How do you plea to one count of Article 695-a of the Tax Law, and Article 22 of said law that occurred on January 1, 1983 -- April 15, 1983, that you rendered and certified a false tax return for your personal tax return for the year ending December 31, 1982? Guilty or not guilty?"

Mr. Nanni: "Guilty."

The Court: "The Court will accept the plea of guilty to both charges, and I will withdraw the remaining charges. I will be ordering a presentence investigation. I will set that for sentencing on June 5th."

On October 6, 1987, the parties again appeared before Judge Regan with respect to Mr. Nanni's sentencing. At that time the Judge stated the following:

"It is the sentence of the Court you be put on probation for a period of three years. The period of probation will run concurrently with that being presently served out of County Court by the Honorable John Connell. As a special condition of probation, I direct that you make restitution at this time. I am going to fix the sum of restitution as \$5,062.27; however, I am going to afford the Department of Taxation and Finance and the Attorney General an opportunity to conduct a restitution hearing, and at which hearing they shall have the burden to prove, you understand? I am putting the burden on the Department of Taxation and Finance This hearing will be conducted on January 19th"

By letter dated October 7, 1987, Mr. Steinman wrote to Judge Regan the following:

"After consulting with the Department of Taxation and Finance, I have concluded that there exists no need for a restitution hearing in the above-captioned matter. Consequently, we are withdrawing our request for the hearing which had previously been scheduled for January 19, 1988."

In an audit report dated October 29, 1987, Mr. Dobson noted that although Mr. Steinman requested a restitution hearing before the Court, he subsequently decided that the civil liability of the case should be disposed of through the administrative process. Mr. Dobson also noted that there was no factual basis for the \$5,062.72 restitution imposed by the Court and that neither Mr. Nanni nor his accountant, Bruce Zicari,⁴ provided

substantiation for certain credits claimed by Mr. Nanni against the net worth analysis.

On February 3, 1988, Mr. Nanni signed an order and conditions of probation agreeing to the three years of probation and restitution in the amount of \$5,062.27 which was satisfied on April 10, 1991.

The Division sent a Statement of Personal Income Tax Audit Changes to Carl and Jacqueline Nanni indicating the following amounts as income tax due:

	<u>1982</u>	<u>1983</u>	<u>1984</u>
"Additional income - per statement			
of net worth analysis	79,946.87	44,078.22	51,829.43
medical deductions disallowed	372.97	1,358.60	1,247.85
less: additional allowable sales tax	(633.72)	(295.84)	(302.80)
net adjustment	79,686.12	45,140.98	52,774.48
taxable income previously stated	3,962.63	3,094.21	1,967.34
corrected taxable income	83,648.75	48,235.19	54,741.82
tax on corrected taxable income	7,728.90	4,216.02	4,882.81"

⁴Mr. Dobson had a conference with Mr. Zicari on July 8, 1987 wherein they discussed the tax liabilities of Mr. Nanni and his closely-held corporation, Computer Accounting Systems, Inc. According to Mr. Dobson's summary of the conference, certain accounting adjustments were claimed against the net worth analysis for which Mr. Zicari agreed to supply documentation at a later date. A second conference between Mr. Dobson and Mr. Zicari on July 16, 1987 resulted in the production of some documentation. According to Mr. Dobson's summary of that conference, Mr. Zicari claimed that he was still working on obtaining documentation for certain other adjustments and would supply them at a later date.

The statement of audit changes also added to the above amounts interest and a 50% fraud penalty pursuant to Tax Law § 685(e).

Thereafter, the Division issued a Notice of Deficiency, dated December 28, 1987, to Carl Nanni, Sr. and Jacqueline Nanni for personal income tax due in the amount of \$16,827.73, plus \$8,413.87 in penalty and \$6,760.22 in interest, for a total amount of \$32,001.82.

After a conciliation conference, the conferee sustained the statutory notice by conciliation order dated March 3, 1989. The caption on the order indicated that the request for relief was brought on behalf of Carl and Jacqueline Nanni.

A petition, dated June 23, 1989, challenging the tax assessment, was signed by Carl Nanni but submitted on behalf of Carl and Jacqueline Nanni. In the petition, petitioners argued that the Division was barred by collateral estoppel from assessing a tax liability greater than the \$5,062.27 restitution order by the Court.

Due to an apparent clerical error, the Notice of Hearing, dated December 3, 1991, with respect to a January 7, 1992 hearing date on the petition was captioned and addressed to Carl W. Nanni, Sr. Therefore, Mrs. Jacqueline Nanni was not given official notice of the January 7 hearing.

At the January 7, 1992 hearing, Mr. Nanni signed a power of attorney appointing Mr. Michael J. Regan, Esq., as his representative. Mrs. Jacqueline Nanni was not present at the hearing. During the hearing, Mr. Nanni stated that he was appearing only on his own behalf and not on behalf of his wife, Jacqueline. He also claimed that all the facts with respect to the tax liability rested with him and that Jacqueline Nanni's only involvement with the tax due was as a joint filer. Mr. Nanni testified that Jacqueline Nanni was not involved with the accounting business of Computer Accounting Systems, Inc. which was listed on their joint income tax returns in 1983 and 1984, on Schedule C, with Jacqueline Nanni as proprietor. Mr. Nanni testified in response to the following query:

Q "... Do you recall why that Schedule C would have been prepared in Mrs. Nanni's name?"

A "I don't recall that far back. It's too far back to recall."

During the hearing, Mr. Nanni's counsel objected to the Division's submission into evidence of a carbon copy of the Notice of Deficiency because he questioned the authenticity of the notice. The basis for the objection was that portions of the name of petitioners ("Nanni - Carl Sr. & Jacqueline") on the letterhead of the notice had been whited-out and typed over. Specifically, the portion "Nanni - Carl" was in carbon type whereas "Sr. & Jacqueline" was in the original typed print over white-out. The notice was accepted into evidence but the record was left open for petitioners to submit the original notice sent to them and the Division to submit another copy of the notice. Neither party made a subsequent submission of the notice.

At the January 7 hearing, the case was completed with respect to Carl Nanni. At hearing, Mr. Nanni's counsel stated that he did not contest the amount of the tax deficiency but instead argued that the Division was collaterally estopped from assessing the deficiency and fraud penalty by the court-ordered restitution of \$5,062.27. Petitioner contended that the amount of restitution was based on an accounting report by Mr. Zicari that was submitted to the Court⁵ and that the Division was represented by Mr. Steinman who had an opportunity to contest the amount and clearly chose not to. Petitioner also argued that Penal Law § 60.27(6), which provides that restitution made pursuant to this section does not preclude or limit any liability for damages in any civil action or proceeding in excess of the

restitution payment, does not apply because the administrative proceeding is not a civil action or civil proceeding. He further argued that the imposition of the tax deficiency and fraud penalty violated the constitutionally guaranteed separation of powers because the administrative agency falls under the executive branch which has no power to relitigate or review a determination of a court of law. With respect to the basis for the fraud penalty, petitioner asserted that the Division

⁵While petitioner's counsel stated that Mr. Zicari's request formed the basis for the amount of the court-ordered restitution, there is no conclusive evidence in the record to support this statement (but see, Finding of Fact "13").

had not met its burden of proving fraud inasmuch as (1) the failure to keep proper books and records with respect to Computer Accounting Systems, Inc. was only evidence of neglect but not fraud, (2) Mr. Nanni's receipt of social security benefits might have been evidence of fraudulent intent with respect to the Federal government but was not probative of fraudulent intent with respect to State income tax, and (3) the Division cannot use the guilty pleas to establish fraud. On this latter point, petitioner contended the Division was taking a contradictory position on the issue of collateral estoppel because if the administrative proceeding was not collaterally estopped by the Court determination of restitution, then the administrative agency could not rely on the Court determination to establish a fraud penalty in the administrative proceeding.

At hearing, the Division's counsel argued in his summation that Mr. Nanni was collaterally estopped from contesting the civil fraud penalty for the period for which he pled guilty to the criminal charge and that the guilty plea also constituted evidence of fraudulent intent for the entire period of the assessment. The Division also contended that other factors to be considered in finding fraudulent intent were (1) Mr. Nanni's experience and knowledge as an accountant representing taxpayers on tax matters before the Division, (2) Mr. Nanni's failure to fully cooperate with the auditor in providing information, (3) evidence that the books and records which were presented were not maintained according to the law, (4) Mr. Nanni's attempt to hide his involvement with Computer Accounting Systems, Inc. when he placed his wife's name as proprietor on Schedule C of the 1983 and 1984 income tax returns, (5) the fact that Mr. Nanni represented to Mr. Dobson in 1985 that he was retired when the audit revealed he received large sums of money for accounting services while receiving social security payments as a retired individual, and (6) Mr. Nanni's felony convictions with respect to failing to remit sales tax money collected from clients. With respect to petitioner's collateral estoppel argument, the Division argued that Mr. Steinman did not waive, in the criminal action, the Division's right to proceed civilly in an administrative proceeding against Mr. Nanni to assess the tax deficiency and fraud penalty and that, in any event, the Court had no authority to shift

the burden of proving the amount of tax due to the Division.

After the January 7 hearing, the Division of Tax Appeals issued a Final Notice of Hearing, dated February 3, 1992, to Jacqueline Nanni scheduling a March 10, 1992 hearing date which was subsequently adjourned to May 1, 1992.

At hearing, Jacqueline Nanni's counsel introduced into evidence a letter signed by Donald L. Lacy stating that, after a comparison of Jacqueline Nanni's signature on the 1982 and 1984 income tax returns in question⁶ with ten solicited signatures and a written paragraph as

well as her signatures on two legal documents which were witnessed and notarized in 1990, it was his opinion "with a reasonable degree of scientific certainty that in all probability Jacqueline Nanni did not write the questioned signatures on the tax forms."⁷ The letterhead on the letter identified Donald L. Lacy as a "questioned document examiner/handwriting analyst".

At hearing, Jacqueline Nanni testified that she was not employed during 1982, 1983 and 1984 and did not earn any income sufficient to warrant the filing of an income tax return for those years. She also testified that she did not file income tax returns for 1982, 1983 or 1984 nor did she sign the 1982, 1983 and 1984 income tax returns submitted into evidence or authorize anyone to file the returns on her behalf. She also disclaimed being a proprietor of Computer Accounting Systems, Inc. as stated in Schedule C of the 1983 and 1984 tax returns. She further testified that she was not an accountant, did not work in or visit her husband's business, and was a housewife with no source of income for the years in question other than through her husband whom she described as the "provider". She testified with respect to her

⁶The Division submitted into evidence at the January 7 hearing the 1982, 1983 and 1984 income tax returns of Carl and Jacqueline Nanni. The names of Carl Nanni and Jacqueline Nanni were signed on the 1982 and 1984 returns. However, the 1983 return was not signed by either Carl or Jacqueline Nanni, but instead was blank on the signature lines.

⁷The record was left open for petitioner to submit an affidavit of Donald L. Lacy confirming his opinion. Accordingly, an affidavit by Donald L. Lacy, notarized on May 7, 1992, was provided with a cover letter dated May 7, 1992.

financial involvement in running the household, in which they both lived, as follows:

Q "During the years 1982 to 1984, do you know if you ever went to Mr. Nanni's office?"

A "No."

Q "You don't know or you never went?"

A "I never went."

Q "Just to clarify, during the years 1982 through 1984, your source of income was Mr. Nanni as a provider?"

A "Yes."

Q "You indicated that you did not share a bank account with Mr. Nanni."

A "No."

Q "Would he provide you with money on a regular basis for the running of the house?"

A "To pay the household bills, yes."

Q "Was this provided to you usually in check or cash or --"

A "He would deposit the money for me and I wrote the checks for bills, just household bills."

Q "This would be from your checking account?"

A "Yes."

Q "Would you give us an example of what type of household bills you regularly paid?"

A "I paid the gas and electric, the telephone and paper. That's about it. He would take care of everything else."

Q "He purchased groceries?"

A "I'm sorry. He gave me money for groceries. That was besides the checking account."

Q "Did you have an automobile?"

A "Yes."

Q "Did you own that automobile or did he?"

A "It's under my name, yes."

Q "I know this is a while back, but for the years '82 to '84, do you remember what type and year of automobile you drove?"

A "A Cadillac."

Q "Do you remember what year it was?"

A "It was about five years old, five or six."

Q "You indicated that Mr. Nanni did have a home office?"

A "No, he doesn't, no, no."

Q "During the years '82 to '84, did he ever request your help regarding ministerial functions of his office? In other words, did he ever ask you to make deliveries for him or copies or answer the phone or do typing or anything like that?"

A "No." (Tr. at 128-130.)

Mrs. Nanni further testified that she lives in the same residence with her husband, is generally home during the day to receive the mail but did not receive, and was unaware of, the Notice of Deficiency and notice of the January 7, 1992 hearing date.

At hearing, Mrs. Nanni's counsel argued in his summation that the Notice of Deficiency was jurisdictionally defective with respect to Jacqueline Nanni because the evidence establishes that she did not file or sign a State income tax return for the years in question and did not receive the Notice of Deficiency or notice of the January 7, 1992 hearing. Thus, argued Mrs. Nanni's counsel, Jacqueline Nanni did not have the opportunity to file a timely petition within 90 days of the Notice of Deficiency⁸ and because such failure was based on a jurisdictional defect in the notice, she was permitted at hearing to ratify Mr. Nanni's petition and move to amend the petition to assert the jurisdictional defect. In conclusion,

Mrs. Nanni's counsel argued that the tax deficiency and fraud penalty should be dismissed against her for lack of jurisdiction.

⁸Mrs. Nanni's counsel also noted that inasmuch as the original Notice of Deficiency was not introduced into evidence and the copy of the notice in evidence contained the whited-out portion over which Jacqueline Nanni's name was typed, there was a question as to whether the notice was ever issued to Jacqueline Nanni.

The Division's counsel argued in his summation at hearing that the Notice of Deficiency was sent to both petitioners because they were joint filers on the income tax returns for the years in question and that the original Notice of Deficiency was only in the possession of petitioners who had not produced it. With respect to Mrs. Nanni's tax liability, the Division argued that under the relevant case law it was significant that Mrs. Nanni benefited directly or indirectly from the income for which the returns should have been filed.

CONCLUSIONS OF LAW

A. Tax Law § 685(e)(1) provides that "[i]f any part of a deficiency is due to fraud, there shall be added to the tax an amount equal to fifty percent of the deficiency." In order to support a finding of fraud, the Division must establish by "clear, definite and unmistakable evidence . . . every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representations resulting in deliberate nonpayment or underpayment of taxes due and owing" (Matter of AAA Sign Company, Tax Appeals Tribunal, June 22, 1989, quoting Matter of Ilter Sener, Tax Appeals Tribunal, May 5, 1988).

Contrary to Mr. Nanni's contention, a taxpayer's conviction or guilty plea for fraudulently filing false tax returns collaterally estops the taxpayer from challenging the civil fraud penalty imposed pursuant to Tax Law § 685(e)(1) for the same period covered by the conviction (see, Plunkett v. Commr., 465 F2d 299 [7th Cir 1972]; Matter of J. Botwinick & Sons, State Tax Commn., December 5, 1986 [TSB-H-87(30)S]). However, for the periods outside those which are covered by a guilty conviction, the Division is required to carry its burden of proof (see, Matter of Chateau Chemists, State Tax Commn., May 4, 1984 [TSB-H-84(67)S] [guilty plea collaterally estops taxpayer from contesting civil fraud penalty only for that period for which he entered a plea of guilty to the criminal charge]). The Division need not establish fraud by direct evidence, but can establish it by circumstantial evidence by surveying the taxpayer's entire course of conduct in the context of the events in question and drawing reasonable inferences therefrom (Plunkett v. Commr., supra at 303; Matter of Cinelli, Tax Appeals Tribunal, September 14, 1989, citing Korecky v. Commr., 781 F2d 1566 [11th Cir 1986]; Briggs v.

Commr., 440 F2d 5 [6th Cir 1962]).

Among the factors that have been considered in finding fraudulent intent are consistent and substantial understatement of taxes (Foster v. Commr., 391 F2d 727 [4th Cir 1968]; Merrit v. Commr., 301 F2d 484 [5th Cir 1962]), the refusal to cooperate and make books and records available (Estate of Granat v. Commr., 298 F2d 397 [2d Cir 1962]), concealment or misstatements concerning ownership of property (Foster v. Commr., supra at 733; Gromacki v. Commr., 361 F2d 727 [7th Cir 1966]), the taxpayer's experience and familiarity with the tax law (Plunkett v. Commr., supra at 299; Matter of AAA Sign Co., supra), and the conduct of the taxpayer's business and circumstances surrounding the preparation of the allegedly fraudulent tax returns (Foster v. Commr., supra at 733). Although a guilty plea in a criminal context collaterally estops the taxpayer from challenging a civil fraud penalty for the period for which the plea was entered, the guilty plea may nonetheless constitute evidence of fraudulent intent for the entire assessment period which corresponds to the time period for which the taxpayer was indicted (see, Matter of Cinelli, supra; cf., Matter of Chateau Chemists, supra [guilty plea with respect to an indictment covering one tax period not evidence of fraud for a subsequent audit of a later tax period]).⁹ Similarly, while mere proof of an understatement of tax, by itself, is insufficient to prove fraud, a consistent and substantial understatement of tax constitutes strong evidence of fraud (Merrit v. Commr., supra at 487 [understatement of \$80,000.00 in income over a seven-year period]; see, Foster v. Commr., supra at 733 [understatement alone not sufficient to prove fraudulent intent but where other factors indicate fraudulent intent, the size and frequency of the omissions are to be considered in determining fraud]).

Here, Mr. Nanni pled guilty to filing a false tax return for personal income tax for the year ending December 31, 1982 and, therefore, is collaterally estopped from challenging a civil tax penalty for the same tax period. At hearing, Mr. Nanni admitted in testimony that he falsely reported on his 1983 and 1984 income tax returns that Jacqueline Nanni was the owner of

⁹In contrast to the situation in Matter of Chateau Chemists, the guilty plea was entered on one count of a three-count allegation that covered the entire audit period at issue.

Computer Accounting Systems, Inc. Mrs. Nanni's testimony confirmed that she was not the proprietor of Computer Accounting Systems, Inc. This conduct in combination with Mr. Nanni's experience as an accountant who represented other taxpayers before the Division, the consistent and substantial underreporting of income over a three-year period, the guilty plea on one count in satisfaction of a three-count indictment with respect to the 1982, 1983 and 1984 income tax returns, the failure to produce certain requested records, and the circumstances

surrounding the preparation of the tax returns including the failure to file tax returns for Computer Accounting Systems, Inc., all constitute sufficient evidence to reasonably infer fraudulent intent on the part of Mr. Nanni for the entire audit period (see, Matter of Cinelli, supra; Matter of AAA Sign Co., supra).

B. Penal Law § 60.27(6) provides that:

"[a]ny payment made as restitution or reparation pursuant to this section shall not limit, preclude or impair any liability for damages in any civil action or proceeding for an amount in excess of such payment."

Without citing any authority, Mr. Nanni's counsel argues that an administrative tax proceeding is not a "civil action or proceeding" within the meaning of section 60.27(6) of the Penal Law. As further support for this contention, Mr. Nanni's counsel argues that the Division is violating the Constitution's guarantee of the separation of powers by permitting an administrative agency to review a court's order. There is no basis for this convoluted reasoning. Indeed, the issue properly framed is whether Mr. Nanni may invoke the principle of collateral estoppel to prevent an administrative agency from exercising its authority to assert a tax deficiency and fraud penalty on the ground that a court of law ordered restitution on a guilty plea in a criminal fraud action. A party seeking the benefit of collateral estoppel has the burden of showing the identity of the issues in the present litigation and the prior determination and that there was a full and fair opportunity to contest the issue in the prior action (see, Matter of Halyalkar v. Board of Regents, 72 NY2d 261, 532 NYS2d 85, 87; Matter of Planit, Tax Appeals Tribunal, February 7, 1991). The Court of Appeals has held that there is no identity of issue if an issue has not been

actually litigated in the prior action either by reason of default or failure to place the matter in issue (Matter of Halyalkar v. Board of Regents, supra, 532 NYS2d at 88-89, citing Kaufman v. Lilly & Co., 65 NY2d 449, 492 NYS2d 584; see, Matter of Planit, supra). Here, neither the issue of the tax deficiency for the three years in question nor the civil fraud penalty was litigated in the prior criminal action. Thus, the doctrine of collateral estoppel does not apply in this situation.¹⁰

Moreover, there was no representation in the prior criminal action that the court-ordered restitution under Penal Law § 60.27(1) was intended as a substitute for, or to satisfy, a civil fraud penalty or tax deficiency under the separate Tax Law. Representations made by a prosecutor in a criminal action to obtain a guilty plea may in some circumstances be used to preclude the Division from assessing a tax liability (see, Matter of Chaipis v. State Liquor Authority, 44 NY2d 57, 404 NYS2d 76; Matter of Dallacqua, Tax Appeals Tribunal, March 2, 1989). The underlying issues in such a situation concern the party's reliance on such promises in entering a guilty plea and the authority of the Attorney General to bind an administrative agency from taking further or separate action (see, Matter of Chaipis v. State Liquor Authority, supra). The Court of Appeals has also held that any off-the-record promises made in a plea bargaining process will not be recognized where they are contradicted by the record or where the party claiming the existence of a promise failed "to inform the Judge accepting the plea of all promises that were made to induce his plea that are not

otherwise revealed" (Matter of Benjamin S. v. Kuriansky, 55 NY2d 116, 447 NYS2d 905, 907-908). In Matter of Benjamin S., the Court stated that:

"[w]e have repeatedly emphasized the necessity of placing all promises on the

¹⁰Contrary to petitioner's claim, the Division's offensive use of the doctrine of collateral estoppel may be invoked inasmuch as the issue of Mr. Nanni's knowing and willful misconduct was before the court to which he made a formal admission of guilt (see, Matter of Halyalkar v. Board of Regents, supra, 532 NYS2d at 90). Thus, petitioner's assertion that the Division is taking a contradictory position has no merit.

record, in order to assure the continued validity and usefulness of the plea bargaining process in our criminal justice system" (id., 447 NYS2d at 907).

Here, there is no evidence that the Attorney General agreed that in exchange for a guilty plea, the restitution ordered by the Court under the penal law would satisfy Mr. Nanni's tax deficiency for the three-year period or any fraud penalty that could be imposed under the Tax Law (see, Matter of N.T.J. Liquors, Tax Appeals Tribunal, May 7, 1992; Matter of Dallacqua, supra). Thus, the Division was not precluded by the court-ordered restitution from imposing a tax deficiency or fraud penalty for the years at issue.

C. Contrary to Jacqueline Nanni's counsel's contentions, the Notice of Deficiency was not jurisdictionally defective as to her. To the extent Mrs. Nanni questions whether the notice was issued to her, there is no basis for a finding that the notice was not issued to both Carl and Jacqueline Nanni. The fact that the copy of the Notice of Deficiency had portions of the name whited-out and typed over does not prove that the original did not contain both names as indicated on the copy. Inasmuch as the original was not in the possession of the Division, but instead was sent to petitioners, it was incumbent upon petitioners to produce it. Moreover, the record evidence establishes that the request for a conciliation conference and petition from the Conciliation Order were made on behalf of Carl and Jacqueline Nanni indicating that the original Notice of Deficiency was issued to both petitioners (see, Findings of Fact "17" and "18").

D. Mrs. Nanni's counsel also argues that the tax deficiency and fraud penalty should be dismissed against Jacqueline Nanni for lack of jurisdiction because she did not sign, file or authorize Mr. Nanni to file a New York State income tax return for her and because she did not receive the Notice of Deficiency. Failure to receive a Notice of Deficiency, by itself, is not a sufficient ground to find the notice invalid. If the Division mailed the notice to the taxpayer's last known address, which is not an issue in this case,¹¹ then failure of a taxpayer to receive a

¹¹Mrs. Nanni testified that she lived in the same house with Mr. Nanni when the notice was issued.

notice merely entitles the taxpayer to a hearing (Matter of Karolight, Ltd., Tax Appeals Tribunal, July 30, 1992, citing Matter of Ruggerite, Inc. v. State Tax Commn., 64 NY2d 688, 485 NYS2d 517).

Mrs. Nanni's lack of jurisdiction argument rests on the fact that she did not sign, file or authorize Mr. Nanni to file a State joint income tax return on her behalf for the years in question. The argument appears to be that Mrs. Nanni was not required to file a State joint income tax return because she allegedly did not earn any income to warrant the filing of an income tax return for the years in question. This allegation alone is not a sufficient basis for a finding that Mrs. Nanni was not required to file a New York State joint income tax return. Tax Law § 651(former [b]) provided that:

"[i]f the federal income tax liabilities of husband and wife . . . are determined on a joint federal return . . . they shall file a joint New York income tax return, and their tax liabilities shall be joint and several except as provided in paragraph five of this subsection (b) and in subsection (e) of section six hundred eighty-five. . . ."

Here, there was no allegation or evidence that Mrs. Nanni did not file a Federal joint income tax return. Moreover, there is not sufficient

evidence in the record to make a finding that Mrs. Nanni had no income and, therefore, was not required to file a State income tax return for the years in question.

However, as noted above, there are exceptions to the statutorily- required tax liabilities of husband and wife filing a joint tax return. With respect to the imposition of a fraud penalty, section 685(former [e]) provided that:

"[i]n the case of a joint return under section six hundred fifty-one, this subsection shall not apply with respect to the tax of a spouse unless some part of the underpayment is due to the fraud of such spouse."

In this case, there is no evidence that the underpayment of the tax was due to the fraudulent intent of Mrs. Nanni; therefore, the fraud penalty shall be dismissed as to her.

With respect to the tax deficiency, Tax Law § 651(former [b][5]) provided as follows:

"(5)(i) Under regulations prescribed by the tax commission, if

"(A) a joint return has been made pursuant to paragraph (2)(A) or paragraph

(3) of this subsection for a taxable year and on such return there was omitted from New York adjusted gross income an amount properly included therein which is attributable to one spouse and which is in excess of twenty-five per cent of the amount of New York adjusted gross income stated in the return,

"(B) the other spouse establishes that in signing the return he or she did not know of, and had no reason to know of, such omission and

"(C) taking into account whether or not the other spouse significantly benefited directly or indirectly from the items omitted from New York adjusted gross income and taking into account all other facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year attributable to such omission, then the other spouse shall be relieved of liability for tax (including interest, penalties and other amounts) for such taxable year to the extent that such liability is attributable to such omission from New York adjusted gross income." (Emphasis added.)

Under paragraph 5, known as the innocent spouse provision, Mrs. Nanni established that she did not know of, or have reason to know of, the underpayment of tax as reported in the joint tax returns for 1982, 1983 and 1984. However, Mrs. Nanni has not provided evidence that she did not significantly benefit directly or indirectly from the income omitted from the tax returns. Indeed, her testimony indicated that her major source of income was Mr. Nanni who provided her with money for bills and groceries for running the household in which they both lived. Therefore, taking into account all the facts and circumstances in the record, Mrs. Nanni has failed to show that it would be inequitable to hold her liable for the tax deficiency (see, Matter of Miller, Tax Appeals Tribunal, February 22, 1991; cf., Matter of Sabatine, Tax Appeals Tribunal, August 25, 1988).

E. The petition with respect to Carl Nanni, Sr. is denied and the Notice of Deficiency, dated December 28, 1987, is sustained as to him.

F. The petition with respect to Jacqueline Nanni is granted to the extent that the fraud penalty is cancelled as to her and in all other respects the petition is denied and the Notice of Deficiency, dated December 28, 1987, with the exception of the fraud penalty, is sustained as to her.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE